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Command Responsibility: A Call to Realign Doctrine with Principles

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COMMAND RESPONSIBILITY:

A CALL TO REALIGN DOCTRINE WITH PRINCIPLES

ARTHUR THOMAS O'REILLY

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INTRODUCTION

The command responsibility doctrine criminalizes a failure by a superior to prevent or punish crimes by subordinates.¹ The modern formulation of this doctrine bases criminal liability on a minimum *mens rea* of negligence and an *actus reus* of omission.² This Article proposes that such a combination of negligence and omission is incompatible with a deontological retributive theory of criminal law that values the individual as the necessary unit of moral accountability.³ Under this doctrine, liability is established without conduct that exhibits strong individualized choice and without a mental element that reflects a guilty mind.⁴ As such, it persists as a utilitarian tool of victor's justice favoring deterrence of crimes and the punishment of superiors over the principle of individualized fault.⁵

International lawmakers and scholars must concern themselves with realigning the doctrine with the notion of individualized fault, a bedrock principle of criminal law.⁶ Absent such concern, support for international criminal justice may erode as the discord between principles of liability and legal doctrines raises doubt regarding the justness and efficacy of the emerging framework of international

1. See Major Michael L. Smidt, *Yamashita, Medina and Beyond: Command Responsibility in Contemporary Military Operations*, 164 MIL. L. REV. 155, 165, 168-70 (2000) (defining "command responsibility" and explaining that the doctrine can be traced as far back as 1474, as well as to early United States military practice).

2. See *infra* Part II.B.1-2 (describing the *mens rea* and *actus reus* of the command responsibility doctrine).

3. See *infra* Part II.B.3 (explaining that the combination of negligence and omission is problematic because it assigns liability without a strong element of fault and independent choice manifested in an action).

4. See *id.* (noting that the command responsibility doctrine requires almost no evidence of individualized responsibility).

5. See, e.g., RICHARD H. MINEAR, *VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL* 67 (1971) (discussing how the command responsibility doctrine was used after World War II to hold Japanese military leaders responsible for the acts of their subordinates).

6. See *infra* Part II.B.4 (explaining that recklessness or willful ignorance should be the minimum *mens rea* required to have some individualization of fault).

criminal law.⁷ Admittedly, the tradition of positivism and the prevailing dynamic of compromise in international lawmaking may hinder such a realignment. Nonetheless, the international legal community must give greater attention to deriving criminal doctrines from first principles and rooting them in a philosophy of law, rather than succumbing to the appeal of utilitarian objectives.⁸

Building upon an historical overview of the origins and evolution of the command responsibility doctrine, this Article provides a normative critique of the elements of command responsibility, and suggests an approach that international legislators should adopt to improve the doctrine in light of its normative failings, and the peculiar nature of international law.⁹ Part I explores the history of the command responsibility doctrine and its eventual codification. In Part II, the merits of the doctrine are examined from the perspective of the retributive theory. Reasons why individualized fault has not become the standard are explored in Part III. Finally, the Conclusion calls on international lawmakers to reflect on their approach to lawmaking and to adopt a coherent philosophy to guide future efforts.

I. AN HISTORICAL ACCOUNT

The origins of command responsibility are ancient, with a long history of development and practice in the laws of various nations.¹⁰ As early as the seventeenth century, Hugo Grotius articulated the

7. See Mirjan Damaska, *The Shadow Side of Command Responsibility*, 49 AM. J. COMP. L. 455, 470-71 (2001) (noting that the principle of culpability is so widely recognized by the international community that it almost serves as a source of public international law).

8. See *infra* Part III (explaining why international law has failed to adequately base criminal doctrines on first principles and what the consequences of such a failure may be).

9. See *infra* Conclusion (suggesting that international lawmakers should concern themselves with advancing an understanding of a common philosophy of law and identifying problematic philosophical issues to provide a framework for rehabilitating international criminal law).

10. See L.C. Green, *Command Responsibility in International Humanitarian Law*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 319, 320-28 (1995) (discussing the historical development of the doctrine from fifteenth-century France to World War II).

basic precept that a community, or its rulers, may be held responsible for the crime if they know of it and do not prevent it when they could and should prevent it.¹¹ Command responsibility emerged as a coherent international legal doctrine more recently.¹² While receiving some treatment in the Conference of Versailles, used to indict Kaiser Wilhelm II after the First World War,¹³ it matured as a theory of international criminal responsibility in the international tribunals following the Second World War.¹⁴ In the Tokyo trials, the Tribunals used the theory of command responsibility to hold commanders liable for war crimes and crimes against humanity committed by subordinates.¹⁵ A complete analysis of command responsibility

11. See HUGO GROTIUS, *THE LAW OF WAR AND PEACE* 523 (Francis W. Kelsey trans., 1925) (1625) (discussing the classical background of a community's duty in certain criminal acts).

12. See generally *Romagoza v. Garcia*, No. 99-8364 (S.D. Fla. July 23, 2002) (finding that two Salvadorian generals should pay \$54.6 million to three individuals who were tortured by the Salvadorian military during the country's civil war based on the command responsibility doctrine on the grounds that the generals allowed a climate to exist in which the military could torture and kill unarmed civilians), at www.cja.org/cases/Romagoza_Docs/RomagozaVerdict.htm (last visited Oct. 19, 2004); see also *Ford v. Garcia*, 289 F.3d 1283 (11th Cir. 2002) (examining the command responsibility doctrine in the context of international legal precedent, yet finding that two El Salvadorian generals were not legally responsible for the abduction, torture, and murder of three nuns and a layperson under the doctrine because the generals did not exercise "effective control" over their subordinates).

13. See, e.g., Commission on the Responsibilities of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference, Mar. 19, 1919*, 14 AM. J. INT'L L. 95, 117 (1920) (holding that high-ranking officers are liable to criminal prosecution for "offences against the laws and customs of war or the laws of humanity").

14. See *infra* Part I.B (discussing the codification of the command responsibility doctrine in the Additional Protocol to the Geneva Convention of 1949).

15. See MINEAR, *supra* note 5, at 67 (noting that the Tokyo tribunals did not accuse any defendants of personally committing an atrocity, but separate tribunals prosecuted and condemned over 900 of them for committing atrocities). The prosecution instead charged the defendants at the Tokyo tribunals with three separate counts: Count 53—conspiring to "order, authorize, and permit" Japanese officials "frequently and habitually to commit" breaches of the laws and customs of war; Count 54 (derived from the Nuremburg trials)—ordering, authorizing and permitting such acts; and Count 55 (new at these tribunals)—deliberately and recklessly disregarding "their legal duty to take adequate steps to secure the observance and prevent breaches" of the laws and customs of war. *Id.*

requires an evaluation of the historical development and current treatment of the modern doctrine.

A. EMERGENCE OF THE COMMAND RESPONSIBILITY DOCTRINE IN THE TOKYO TRIBUNALS: A LEGACY OF VICTOR'S JUSTICE

The Trial of General Tomoyuki Yamashita serves as perhaps the most frequently cited World War II command responsibility case, and certainly the most famous of the Tokyo Tribunal cases.¹⁶ While the *Yamashita* trial affirmed the principle of individual accountability for crimes against international law advanced during the Nuremburg trials,¹⁷ it was also the first international war crimes trial to find a commanding officer criminally liable without any direct evidence linking him affirmatively to the crimes committed by his subordinates.¹⁸ Articulating what is now regarded as the doctrine of command responsibility, the *Yamashita* trial included a charge of "negative criminality,"¹⁹ or liability for a failure to act.²⁰

16. See TIM MAGA, JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS 18 (2001) (noting that historians and others have heard more about the *Yamashita* trial than the entire trials effort in Tokyo for various reasons, including the attention of the world press, general public knowledge of Yamashita's successful military campaigns, and General Douglas MacArthur's showmanship and attention to the case); see also STEVEN R. RATNER & JASON S. ABRAMS, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW, BEYOND THE NUREMBURG LEGACY 6 (1997) (calling the legal actions taken by the international community after World War II "the watershed for the development of the principle of accountability for human rights abuses").

17. See ROBERT K. WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW 6 (1962) (noting that the Charter of the International Military Tribunal accused a wide cross section of individuals, including civilians, of crimes between 1939 and 1945).

18. See RICHARD L. LAEL, THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY xi (1982) (explaining that the first use of new streamlined legal methods and charges based on a failure to exercise command responsibility sparked a legal controversy). But see Smidt, *supra* note 1, at 169-70 (claiming that command responsibility can be traced as far back as 1474, as well as to early United States military practice).

19. See MINEAR, *supra* note 5, at 67 (discussing that the inclusion of "negative criminality" in Count 55 almost indicated an admission of the difficulty of convicting the defendants under Count 54, which charged that the defendants actually "ordered, authorized, and permitted" the illegal acts).

20. See LAEL, *supra* note 18, at xi (noting that the *Yamashita* trial was the first war crimes trial to charge an officer for failing to fulfill his responsibilities without

This theory of liability appealed to the prosecution because it had no direct evidence that Yamashita participated in or had knowledge of the atrocities committed by soldiers under his command.²¹ While international lawmakers had previously considered this theory of liability, they did not widely accept it before the Tokyo Tribunals.²² In fact, the United States representatives to the 1919 Commission of Responsibilities at Versailles explicitly rejected negative criminality.²³ These representatives intimated that liability was improper without an overt criminal act, or knowledge of the criminal acts of others, and proof of the power to prevent their commission.²⁴

In his petition to the U.S. Supreme Court, Yamashita argued that the laws of war did not recognize negative criminality, and, therefore, excluded his case from the Tribunal's jurisdiction.²⁵ The Court rejected this argument, claiming that the charge fulfilled the general purpose of the law of war because a commanding general's duty is to control his troops in order to protect civilian populations and prisoners of war.²⁶ The Court cited the Hague Convention of 1907,²⁷

any evidence that linked him to the crime).

21. See MINEAR, *supra* note 5, at 68 (explaining that the tribunal held the Japanese military officials accountable for the acts of their subordinates despite the fact that the defendants lacked knowledge of their subordinates' acts).

22. See *id.* at 72 (noting that the American Government had rejected the concept of negative criminality at Versailles in 1919, as did the French representative in London in 1945).

23. See *id.* (relaying that the United States did not even believe that negative criminality existed).

24. See Carnegie Endowment for International Peace, Division of International Law, VIOLATION OF THE LAWS AND CUSTOMS OF WAR: REPORTS OF THE MAJORITY AND DISSENTING REPORTS OF AMERICAN AND JAPANESE MEMBERS OF THE COMMISSION OF RESPONSIBILITIES, CONFERENCE OF PARIS, 1919 72 (1919) (noting the opposition of the American representatives to punishing a person "who failed to prevent, to put an end to, or to repress violations of the laws of customs of war").

25. See *In re Yamashita*, 327 U.S. 1, 14 (1946) (noting that Yamashita claimed that since the charge against him did not allege the commission or direction of commission of acts against the civilian population of the Philippines, the prosecution made no actual charge against him); see also MINEAR, *supra* note 5, at 69-70 (noting a Tokyo tribunal justice's opinion that Yamashita could not reconcile Count 55 (negative criminality) with the charter).

26. See *id.* at 15 (asserting that "the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are

as well as Article 26 of the Geneva Convention of 1929,²⁸ to support its position that commanders have affirmative duties and responsibilities for their subordinates under international law.²⁹

In a vigorous dissent, Justice Murphy criticized the Court's ruling, stating that war atrocities "have a dangerous tendency to call forth primitive impulses of vengeance and retaliation among the victimized peoples."³⁰ Justice Murphy also asserted that the Tribunal based Yamashita's conviction on standards created unilaterally by the victors, rather than standards evinced from international law.³¹

The Tokyo Tribunal's acceptance of negative criminality as an established legal theory was questionable, considering its limited treatment in international legal documents and lack of customary recognition.³² Even more troubling was the Tribunal's finding of guilt without precisely defining or applying the evidence to constitutive elements of negative criminality.³³ The charge made no attempt to define the essential elements of negative criminality, and the Tribunal failed to state the *mens rea* standard it chose to apply.³⁴

to some extent responsible for their subordinates").

27. See Annex to the Convention Respecting the Laws and Customs of War on Land, Oct. 19, 1907, § 1, art. 1, 36 Stat. 2277, 2295 (declaring that the treaty applies to armed forces "commanded by a person responsible for his subordinates").

28. Convention for the Amelioration of the Condition of the Wounded and Sick of Armies in the Field, July 27, 1929, art. 26, 47 Stat. 2074, 2092 (declaring it the responsibility of commanding officers to insure the execution of the treaty).

29. See *Yamashita*, 327 U.S. at 15 (asserting that these conventions of international law proved a long-established duty on the part of a commanding officer).

30. See *id.* at 29 (Murphy, J., dissenting) (acknowledging that war atrocities are the byproducts of war, but asserting that revenge is not the correct response).

31. See *id.* at 35 (Murphy, J., dissenting) (stating that defining the duty of a commanding officer under battle conditions requires difficult calculations that become untrustworthy when made by the victor).

32. See Smidt, *supra* note 1, at 175 (asserting that the plain language of the international statutes cited by the Supreme Court require that a commander actively participate in the perpetration of war crimes).

33. See *Yamashita*, 327 U.S. at 53 n.17 (Rutledge, J., dissenting) (concluding that the majority's definition of the crime and, specifically, whether knowledge must be proved, was ambiguous).

34. See *id.* (asserting that the prosecution failed to indicate whether it accused

While General Yamashita was probably morally culpable as a military commander,³⁵ his conviction was not based on a principled approach to criminal justice.³⁶ The Tribunal's judgment was an example of judicially-sanctioned vengeance, rather than justifiable retribution.³⁷ As such, the doctrine of command responsibility began as an instrument of victor's justice,³⁸ rather than as a well-considered theory of criminality.³⁹

B. THE ADDITIONAL PROTOCOL TO THE GENEVA CONVENTION OF 1949: COMMAND RESPONSIBILITY CODIFIED

The doctrine of command responsibility has gained widespread recognition since its application in the *Yamashita* trial.⁴⁰ Adopted in 1977, Article 86 of Additional Protocol to the Geneva Convention of

Yamashita of knowing that subordinates committed the crimes, whether he failed to prevent those crimes, or whether he failed to discover that the crimes occurred).

35. See CLAUDE PILLOUD ET AL., COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1014 n.39 (Yves Sandoz et al. eds., 1987) [hereinafter COMMENTARY] (suggesting that the Tribunal decided, based on the widespread nature of the crimes committed by the soldiers under his command, that it was likely that Yamashita was aware of the crimes and failed to prevent or punish them).

36. See MINEAR, *supra* note 5, at 73 (emphasizing that the Tokyo Tribunal agreed with the prosecutor's interpretation of international law on every issue in the case, and declaring that a different decision by the Tribunal on just one of the issues would have changed the nature of the entire case).

37. See JOHN ALAN APPLEMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES 10 (1954) (explaining that one who is "embroiled in passion" when considering a case is likely to pursue vengeance rather than a just punishment).

38. See MINEAR, *supra* note 5, at 179-80 (setting forth the thesis that the Tokyo trial did not have a strong foundation and that it was procedurally flawed, and further asserting that the Tokyo trial was a "kind of morality play").

39. See Prosecutor v. Blaskic, Case No. IT-95-14-T, ¶ 322 (I.C.T.Y. Mar. 3, 2000) (suggesting that the World War II trials developed the standard that a commander is liable for the crimes of his subordinates if the commander should have known about the crimes or should have made an effort to know about them), available at <http://www.un.org/icty/blaskic/trialc1/judgement/index.htm> (last visited Oct. 19, 2004).

40. See COMMENTARY, *supra* note 35, at 1006 (recognizing that, although there were some convictions based on the failure to act during the trials following World War II, Article 86 first codified a violation of international law due to an omission).

1949 (“Additional Protocol”)⁴¹ was the first international treaty to codify the doctrine, creating an affirmative duty to repress grave breaches of international law, and imposing penal and disciplinary responsibility on superiors for breaches committed by subordinates. Article 86 states:

1. The High Contracting Parties and the Parties to the conflict shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol which result from a failure to act when under a duty to do so.

2. The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.⁴²

Based on the statutory language, Article 86 punishes a failure to prevent or repress where a superior has information that should have enabled him to conclude that breaches of the Convention occurred or were about to occur.⁴³

Commentary on the Additional Protocol reveals that Article 86 includes some controversial issues.⁴⁴ The imposition of liability on commanders for an omission rather than an action makes it more difficult to define the limits of a commander’s responsibility.⁴⁵ During drafting, the representatives to the Convention objected most strongly

41. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, art. 86, 16 I.L.M. 1391, 1428-29, 1125 U.N.T.S. 3 [hereinafter Additional Protocol].

42. See *id.*

43. See *id.*

44. See *infra* notes 45-52 and accompanying text (describing the controversy over assigning liability for an *actus reus* that is an omission and a *mens rea* of negligence).

45. See COMMENTARY, *supra* note 35, at 1009-10 (listing examples of breaches of law that result from a failure to act and discussing the challenges in defining a commander’s duty to act in the context of international law).

to the imposition of liability for a failure to act where the *mens rea* is negligence.⁴⁶

Although the language of the statute clearly indicates that the *mens rea* requirement is met where superiors “had information that should have enabled them to conclude”⁴⁷ that a subordinate was committing or had committed a breach,⁴⁸ the commentary relates the delegates’ ultimate conclusion that a mere negligence standard is too low.⁴⁹ Every case of negligence, however, is not necessarily criminal.⁵⁰ It appears that the drafters of the Additional Protocol intended a *mens rea* that approached recklessness or willful blindness, rather than mere negligence.⁵¹ The drafters wanted to ensure that a superior who “deliberately wishes to remain ignorant” would not avoid criminal liability.⁵²

While the intent of the drafters is reasonably clear, it is not certain that a recklessness standard will prevail in practice.⁵³ As seen in the *Yamashita* trials, zealous victors may be tempted to manipulate ambiguous standards to achieve objectives they perceive to be just.⁵⁴ Although the legislative history of Article 86 may prescribe an

46. See *id.* at 1011-12 (noting that there is no provision in the Convention that defines negligent conduct as criminal).

47. See Additional Protocol, *supra* note 41, art. 86 (stating that when an officer has this information, the officer is responsible for the actions of his subordinates).

48. See COMMENTARY, *supra* note 35, at 1012 (reciting one delegate’s conclusion that the language in Article 86 should have indicated that any breach resulted from negligence).

49. See *infra* notes 50-52 and accompanying text (clarifying that the negligence must be malicious in order for it to be considered criminal).

50. See COMMENTARY, *supra* note 35, at 1012 (contending that for negligence to be criminal, it must be practically the same as malicious intent).

51. See *id.* at 1015 (asserting that a superior has a duty to take both preventive and repressive measures to stop a breach of the law of armed conflict but recognizing that restrictions are placed on the types of action required because a superior cannot necessarily prevent every breach of law).

52. See *id.* (stating that a superior cannot absolve himself of responsibility by claiming ignorance of reports addressed to him, the tactical situation, the levels of training and instruction of subordinates, or the character traits of subordinates).

53. See RATNER & ABRAMS, *supra* note 16, at 128 (suggesting that in practice the difference between strict liability and negligence could be small).

54. See MINEAR, *supra* note 5, at 178 (alluding to elements of unfairness in the trial).

elevated *mens rea*, the statutory language can easily be interpreted to require only an objective negligence standard.⁵⁵

C. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

In the wake of the human rights atrocities committed in the former Yugoslavia, the international community sought an ad hoc criminal statute that would allow for the prosecution of those who orchestrated the atrocities, as well as those who carried out the violations.⁵⁶ Article 7(3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) provides as follows:

[t]he fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.⁵⁷

Despite the debate raised during the command responsibility doctrine’s initial codification in the Additional Protocol, Article 7(3) of the ICTY preserves—at least facially—a “negligence” *mens rea* standard.⁵⁸ Although the jurisprudence of the Tribunal once again

55. See RATNER & ABRAMS, *supra* note 16, at 128 (noting that the standard could be interpreted in a manner that would create strict liability).

56. See International Criminal Tribunal for the Former Yugoslavia, *General Information*, (stating that the Tribunal has the authority to prosecute breaches of the 1949 Geneva Conventions, violations of the laws of war, genocide, and crimes against humanity), at <http://www.un.org/icty/cases/factsheets/generlinf-e.htm> (last visited Aug. 11, 2004).

57. See Statute of the International Tribunal for the Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., art. 7(3), U.N. Doc. S/RES/827 (1993), available at <http://www.un.org/icty/basic/statut/stat11-2004.htm> (last visited Oct. 19, 2004).

58. See, e.g., KRIANGSAK KITTICHAISAREE, *INTERNATIONAL CRIMINAL LAW* 254 (2001) (stating that the negligence standard for command responsibility is equal to at least acquiescence and possibly malicious intent). Most commentators and courts assert that this standard is not a form of strict liability. *Id.* But see RATNER & ABRAMS, *supra* note 16, at 128 (noting that, in practice, the difference between negligence and strict liability narrows when an investigator contends that a commander has the means to learn of abuses by subordinates based on a small

demonstrates an institutional concern for allowing simple negligence to suffice for criminal liability, ICTY cases have adopted a fairly low *mens rea* requirement.⁵⁹

In *Prosecutor v. Delalic*, the Trial Chamber indicated that the drafters of Article 86 did not intend negligence to be a purely objective standard.⁶⁰ The court examined the legislative history of the statute and found that the drafters rejected such a standard when they refused to adopt language assigning liability if the commander “knew or should have known” of the actions of the commander’s subordinates.⁶¹ Instead, the Trial Chamber found that the prosecution must show that the individual actually possessed specific information that would put the individual on notice of the crimes of his or her subordinates.⁶²

The precise contours of this “information” requirement are not clear, however; it appears to create a *mens rea* standard that resides somewhere between simple negligence and recklessness.⁶³ The Tribunal cases reveal that a principal objective underlying the *mens rea* requirement of ICTY Article 7(3) is to prevent a superior from remaining willfully blind to the acts of his subordinates.⁶⁴ The Trial

amount of information).

59. See *infra* notes 60-69 and accompanying text (examining the Tribunal’s efforts to explain the negligence standard).

60. See *Prosecutor v. Delalic*, Case No. IT- 96-21-T, ¶ 392 (I.C.T.Y. Nov. 16, 1998) (noting that the English version of the statutory provision differs from the French version in that the English version contains both an objective and subjective element while the French version contains only an objective element). The delegates decided that these differences were not substantive. *Id.*

61. See *id.* ¶ 391 (discussing the drafters’ rejection of the International Committee of the Red Cross’ proposal and the amended version offered by the United States, both of which included language requiring that an officer knew or should have known of the actions of his or her subordinates in order to be criminally liable for the actions of those subordinates); see also M. CHERIF BASSIOUNI, *THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY* 485 n.16 (1998) (noting that “had reason to know” and “should have known” are not always distinguished).

62. See *Delalic*, Case No. IT-96-21-T, ¶ 393 (commenting that the information by itself need not prove that the crimes took place).

63. Compare *id.* (explaining that “information” is such that a responsible superior would look into the matter further), with *infra* notes 163-165 and accompanying text (defining “recklessness” and “negligence”).

64. See *infra* notes 65-69 and accompanying text (reviewing how the Tribunal has addressed the knowledge element).

Chamber in *Delalic* stated that “[t]here can be no doubt that a superior who simply ignores information within his actual possession compelling the conclusion that criminal offences [sic] are being committed, or are about to be committed, by his subordinates commits a most serious dereliction of duty...”⁶⁵ However, the Tribunal advocated a standard that is more burdensome on the superior than a recklessness or willful blindness *mens rea* that would be adequate to meet this objective. Instead of requiring a showing of gross negligence or negligence that is tantamount to malicious intent, the Trial Chamber in *Delalic* stated that the *mens rea* requirement is met if the accused possesses information that:

need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates.⁶⁶

More recently, the Trial Chamber in *Prosecutor v. Blaskic* retreated from the already low information standard in *Delalic*.⁶⁷ It prescribed a negligence-type *mens rea*, stating that, “ignorance cannot be a defence [sic] where the absence of knowledge is the result of negligence in the discharge” of an officer’s duties.⁶⁸ A court need only assess the “particular position of command and the circumstances prevailing at the time”⁶⁹ to determine if the commander had reason to know.

D. THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA

As in Yugoslavia, the massive human rights atrocities and genocide committed in Rwanda prompted the creation of a statute that permitted

65. See *Delalic*, Case No. IT 96-21-T, ¶ 387 (proclaiming that an officer will be held criminally liable for ignoring this sort of information).

66. See *id.* ¶ 393 (confirming that this is the standard for the *mens rea* required by Article 7(3)).

67. See *Blaskic*, Case No. IT-95-14-T, ¶ 332 (declaring that an officer will not be liable for the illegal actions of his subordinates where the officer exercised due diligence but remained unaware).

68. See *id.* (concluding that ignorance is not a defense where an officer had reason to know of illegal actions being committed by his subordinates).

69. See *id.*

the prosecution of leaders as well as subordinates.⁷⁰ Article 6(3) of the Statute of the International Criminal Tribunal for Rwanda ("ICTR") states that a superior is liable for a subordinate's criminal acts if the superior knew or should have known that the subordinate would commit such acts, or if the superior failed to prevent or punish such acts.⁷¹ Although virtually identical to the statute of the ICTY, the ICTR has treated the *mens rea* requirement of command responsibility in somewhat different and varied ways.⁷²

Analyzing the *mens rea* requirement in *Prosecutor v. Musema*, the Trial Chamber examined the legislative history of the Additional Protocol and adopted a comparatively high *mens rea* requirement.⁷³ It found that:

the requisite *mens rea* of any crime is the accused's criminal intent. This requirement, which amounts to at least a negligence that is so serious as to be tantamount to acquiescence, also applies in determining the individual criminal responsibility of a person accused of crimes defined in the Statute, for which it is certainly proper to ensure that there existed malicious intent, or, at least, to ensure that the accused's negligence was so serious as to be tantamount to acquiescence or even malicious intent.⁷⁴

In marked contrast to the position held in *Musema*, the Trial Chamber in the more recent case of *Prosecutor v. Bagilishema*, advocated a reduced, negligence-type *mens rea* requirement.⁷⁵ It

70. See International Criminal Tribunal for Rwanda, *General Information* (stating that the Tribunal prosecutes those who have committed genocide or who have violated international humanitarian law in the territory of Rwanda in 1994), available at <http://www.ictr.org/ENGLISH/geninfo/index.htm> (last visited Oct. 19, 2004).

71. See Statute of the International Criminal Tribunal for Rwanda, art. 6(3), 33 I.L.M. 1602, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994), amended by U.N. Doc. S/RES/1512 (2003), available at <http://www.ictr.org/ENGLISH/basicdocs/statute.html> (last visited Oct. 19, 2004).

72. See *infra* notes 74-76 and accompanying text (outlining two different negligence standards the Court employed in two separate cases).

73. See *infra* note 74 and accompanying text (describing the requirement of an elevated standard of negligence to meet the *mens rea*).

74. See *Prosecutor v. Musema*, Case No. IT-96-13-A, ¶ 131 (I.C.T.R. Jan. 27, 2000), available at 2000 WL 33348765.

75. See *infra* note 76 and accompanying text (describing the Trial Chamber's position as to when an officer will have the requisite *mens rea* to be held

found, pursuant to Article 6(3) of the ITCR, that a superior possesses the requisite *mens rea* where:

[h]e or she had information which put him or her on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such offences were about to be committed, were being committed, or had been committed, by subordinates; or,

the absence of knowledge is the result of negligence in the discharge of the superior's duties; that is, where the superior failed to exercise the means available to him or her to learn of the offences, and under the circumstances he or she should have known.⁷⁶

E. THE INTERNATIONAL CRIMINAL COURT

The Rome Statute of the International Criminal Court ("ICC") is the first international instrument that comprehensively established a general code of international criminal law.⁷⁷ Article 28 of the ICC statute codifies the command responsibility doctrine. In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

criminally liable).

76. See *Prosecutor v. Bagilishema*, Case No. IT-95-1A-T, ¶ 46 (I.C.T.R. June 7, 2001), available at 2001 WL 677343.

77. See THE INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 20 (Roy S. Lee ed., 2001) [hereinafter ICC: ELEMENTS AND RULES] (noting the Rome Statute's inclusion of a variety of penal principles, including legality, individual criminal responsibility, the responsibility of accomplices, genocide, and command responsibility).

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

(b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.⁷⁸

Article 28 is the first international statute that distinguishes between civilian and military superiors, assigning different standards of culpability based on this classification.⁷⁹ It is not entirely clear what practical, political, or philosophical reasons prompted this division.⁸⁰

78. Rome Statute of the International Criminal Court, July 17, 1998, art. 28, U.N. Doc. A/CONF. 183/9 [hereinafter Rome Statute], available at <http://www.un.org/law/icc> (last visited Oct. 19, 2004).

79. See ICC: ELEMENTS AND RULES, *supra* note 77, at 21 (discussing the deviation from the standard *mens rea* used elsewhere in the Rome Statute).

80. See, e.g., Prosecutor v. Kayishema, Case No. IT-95-1-T, ¶ 216 (I.C.T.R. May 21, 1999) (indicating that some drafters may have desired a higher *mens rea* because of the perception that civilians are perceived as having less control and consequently, less of a duty than military commanders). Specifically, the court stated that, "the crucial question in those cases was not the civilian status of the accused, but of the degree of authority he exercised over his subordinates." *Id.* See also Prosecutor v. Akayesu, Case No. IT-96-4-T, ¶ 490 (I.C.T.R. Sept. 2, 1998) (noting that Judge Röling's strong dissent in the Tokyo trials expressed concern

However, it is clear that this aspect was a source of considerable debate during negotiations.⁸¹ Irrespective of motivations, the explicit recognition of both a reckless-type “conscious disregard” standard and a negligence standard requires an interpretation such that the International Criminal Court hold military commanders to some form of negligence standard.⁸²

F. THE FUTURE OF THE DOCTRINAL ELEMENTS OF COMMAND RESPONSIBILITY

Prior to the creation of the ICC, the relative statutory ambiguity in the Additional Protocol and Tribunal statutes permitted interpretive flexibility and minimum *mens rea* standards that resided somewhere between negligence and recklessness.⁸³ However, the codification of distinct negligence and recklessness-type standards in the ICC statute makes such flexibility improbable in the immediate future.⁸⁴ The ICC statute will influence the customary development of the command responsibility doctrine because international courts considered it compelling evidence of the practice and policies of states; therefore, the likely result will be that international courts recognize negligence as the minimum *mens rea* for military commanders and recklessness as the minimum *mens rea* for civilian superiors.⁸⁵

with holding civilian officials responsible for the behavior of the army in the field and that considerations of justice and expediency indicate that responsibility for civilian superiors should be restricted).

81. See ICC: ELEMENTS AND RULES, *supra* note 77, at 21 (reporting on the considerable debate about the “subjective part of a crime” and the effect on the newly drawn distinction between civilian and military superiors).

82. But see Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court*, 25 YALE J. INT’L L. 89, 122 (2000) (arguing that the ICC statute does not give a simple negligence standard). Vetter further argues that the clause “owing to the circumstances at the time” makes the *mens rea* distinguishable from a “mythical should have known” standard. *Id.*

83. See *supra* note 55 and accompanying text (relating the ease in which interpretation can lower the relevant level of *mens rea*).

84. Cf. *id.* (emphasizing the previous flexibility that courts had at interpretation).

85. See, e.g., *Blaskic*, Case No. IT-95-14-T, ¶ 322 (prescribing a negligence standard for military commanders after completion of the ICC statute).

II. A NORMATIVE CRITIQUE

The preceding historical account reveals that the command responsibility doctrine, in its various customary and statutory manifestations, creates liability based on a combination of omission and a minimum *mens rea* that resides somewhere between negligence and recklessness. The next part of this Article will assess the justness of such a combination.⁸⁶

A. A PHILOSOPHY OF CRIMINAL LAW

The philosophy underlying criminal law establishes the parameters that should constrain lawmakers in the creation and punishment of crimes.⁸⁷ Therefore, any critique of the “justness” of a particular criminal law doctrine must proceed from a philosophical starting point.⁸⁸

A community, whether it is local, national, or international, develops norms that reflect some conception of good. Society criminalizes behavior in order to announce these norms, to punish conduct that it deems reprehensible, and to discourage socially unacceptable behavior.⁸⁹ Thus, criminal law serves many goals, including the deterrence and punishment of crimes, incapacitation, denunciation of wrongfulness, and rehabilitation.⁹⁰

Lawmakers should distinguish the myriad aspirational goals of criminal law from the goals and limitations required by a particular

86. See Damaska, *supra* note 7, at 456 (noting that as international criminal justice institutions come into being, the pairing of these issues should be discussed).

87. See DOUGLAS N. HUSAK, *PHILOSOPHY OF CRIMINAL LAW* 224 (1987) (underscoring the importance of determining the “limits of the criminal sanction as an integral part of criminal theory”).

88. See *id.* (advocating the need to start with the philosophy behind the creation of the laws to determine whether the doctrine is working).

89. See APPLEMAN, *supra* note 37, at 9 (explaining that the purpose of criminal law is to punish the wrongdoer for his offense against the mores of society and to deter others from acting likewise).

90. See C.T. SISTARE, *RESPONSIBILITY AND CRIMINAL LIABILITY* 11-12 (1989) (discussing the law’s twin aims of ensuring public safety and individual justice).

philosophy or theory of criminal law.⁹¹ For example, a utilitarian-based, deterrence theory of criminal law allows society to use an individual to promote and ensure conformity to its standards.⁹² Conversely, a deontological, retributive theory of criminal law generally requires that society ground liability in individual guilt, and not use the individual solely for the pursuit of societal ends.⁹³ It is possible to conceive of law as proceeding from a singular philosophy with certain mandates, but having consequences that are the aspirational objectives of many different philosophies. These consequences, however, are merely coincidental and may not override the mandates of the theory that guides the creation of legal norms.

This Article presumes the correctness of a deontological, retributive theory of criminal law.⁹⁴ Under this theory, lawmakers should criminalize and punish only wrongful and blameworthy conduct.⁹⁵ There must be some moral justification for imposing suffering upon another person. This theory implicitly recognizes the value of the human person as the “subject, end, and intellectual point of reference in the idea of law,”⁹⁶ which considers the individual a moral actor

91. See HUSAK, *supra* note 87, at 227 (showing the potential contradictions in criminal theory which result depending on the moral philosophy used for analysis).

92. See Joanna Waley-Cohen, *Collective Responsibility in Qing Criminal Law*, in *THE LIMITS OF THE RULE OF LAW IN CHINA* 112 (Karen G. Turner et al. eds., 2000) (describing the historical approach of the Chinese and the application of collective responsibility to “create a self policing network” to reinforce the power of the state).

93. See also Joel Feinberg, *Collective Responsibility*, in *INDIVIDUAL AND COLLECTIVE RESPONSIBILITY* 51 (Peter French ed., 2d ed. 1998) (1972) (explaining that all primitive legal systems recognized the notion of collective responsibility whereby moral fault is transferred across a group and is not necessarily restricted to the individual).

94. See MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 28 (1997) (basing the same assumption on the notion that punishing an individual beyond what he deserves does not achieve retributive justice and that the structure of Anglo-American law does not effectively deter future criminal behavior).

95. See HUSAK, *supra* note 87, at 225 (explaining that “the retributive tradition . . . restricts punishment to the *deserving*”) (emphasis in original).

96. Franz Wieacker, *Foundations of European Legal Culture*, 38 AM. J. COMP. L. 1, 20 (1990). See generally Janet E. Smith, *Natural Law and Personalism in Veritatis Splendor*, in *JOHN PAUL II AND MORAL THEOLOGY: READINGS IN MORAL THEOLOGY* NO. 10 67 (Charles E. Curran & Richard A. McCormick, S.J. eds.,

whose will and choices help define the blameworthiness of actions and justify his punishment.⁹⁷

Although criminal punishment may have the added benefit of deterring future conduct, deterrence and other utilitarian objectives of punishment are coincidental and should not override the moral justifications for law and punishment.⁹⁸ Justice requires a respect for moral rights, and, therefore, that lawmakers root criminal law in moral justifications; however, they “need not purge utilitarian thinking from the law altogether.”⁹⁹ Deterring crime and protecting society should be a concern of criminal justice; however, such utilitarian benefits should not be justified by violating fundamental principles of criminal liability.¹⁰⁰

B. A NORMATIVE CRITIQUE OF THE DOCTRINE OF COMMAND RESPONSIBILITY

The scope of the command responsibility doctrine is one of the most important issues in international criminal law.¹⁰¹ Interpreted liberally, the doctrine can have a powerful deterrent effect, giving superiors and commanders the incentive to prevent and punish violations of human rights and humanitarian law.¹⁰² It can also help improve the chances of prosecuting superiors and commanders who

1998) (comparing natural law and personalism).

97. Cf. WALTER G. JEFFKO, CONTEMPORARY ETHICAL ISSUES: A PERSONAL PERSPECTIVE 18 (1999) (recognizing the moral importance of will and intention, but disagreeing that the law should reduce the total morality of an action to its intention). Rather, “both motive and consequences have moral significance as elements of action.” *Id.*

98. See MOORE, *supra* note 94, at 89 (noting that retributivists believe that the deterrence of future criminal acts is not a justification for punishment).

99. HUSAK, *supra* note 87, at 51 (suggesting that by punishing culpable persons, gains in utility may offer a necessary condition for criminalization).

100. See *id.* at 52 (indicating that such requirements of justice should establish the boundaries in which reform must take place).

101. See RATNER & ABRAMS, *supra* note 16, at 128. (showing uncertainty of the scope of individual responsibility for potential aggressors, and weighing the import of the Nuremberg Principles).

102. See *supra* note 25 and accompanying text (maintaining that finding Yamashita criminally liable helped to deter future criminal behavior which would have violated the laws of war).

are complicit in criminal activity, but due to their elevated positions, are able to avoid liability for individual criminal acts.¹⁰³ While the doctrine has proven effective as a prosecutorial tool and may deter crime, an analysis of the jurisprudence defining and applying the elements of the doctrine reveals that the law has not consistently developed in a manner that respects a deontological retributive theory.¹⁰⁴

The scope of the doctrine depends upon the elements of the crime and requires that a superior-subordinate relationship exists; that the superior knew, or should have known, or deliberately ignored information that would lead him to believe that a subordinate would commit or had committed a crime; and that the superior failed to take measures to prevent the crime or punish the person behind the criminal act.¹⁰⁵

As discussed, the statutes and cases combine a minimum *mens rea* of negligence (arguably recklessness depending upon the court and statute) with an *actus reus* of omission.¹⁰⁶ Although independently-valid bases for criminal liability, the convergence of omission and negligence is problematic because the retributive theory normally requires a respect for moral principles and a justification for punishment grounded in the blameworthiness of the individual.¹⁰⁷ The command responsibility doctrine's combination of elements does not ground liability in individual fault.¹⁰⁸ Rather, the combination assigns liability based on whether the person had the power to prevent the

103. See *supra* note 18 and accompanying text (discussing the *Yamashita* court's extension of liability to a commander without direct evidence linking him to the crimes committed by his subordinates).

104. See *infra* notes 175-178 and accompanying text (discussing the additional importance that the International Criminal Court places on deterring future conduct).

105. See Rome Statute, *supra* note 78, art. 28 (detailing the responsibilities of commanders and other superiors).

106. See *infra* Part II.B.3 (analyzing the confluence of omission and negligence in command responsibility).

107. See MOORE, *supra* note 94, at 79 (demanding that those subject to punishment have done something both morally and culpably wrong and stressing the importance of "wrongful action") (emphasis added).

108. See Rome Statute, *supra* note 78, art. 28 (basing liability for a military commander on the extent of their knowledge of the relevant crime).

crime.¹⁰⁹ This formulation values deterrence of crime over the importance of the person, using the person as a means to an end. Such a use is anathema to the retributive theory.¹¹⁰ In those instances in which international courts will interpret the doctrine to require a mental element that is more than negligence, the command responsibility doctrine is more consistent with a retributive theory of law.

1. Negligence: A Weak Basis for Liability Under the Retributive Theory

Criminal liability generally requires a guilty mind, or *mens rea*, causally linked to some form of affirmative, voluntary conduct.¹¹¹ The law recognizes various degrees of *mens rea*, including intent, knowledge, recklessness, and negligence, with differing levels of agreement regarding their appropriateness as a basis for criminal liability.¹¹²

The *mens rea* of intent is paradigmatic of the guilty mind.¹¹³ Intent is the best indication of a conscious choice to commit a crime.¹¹⁴ Intent, coupled with affirmative action, is evidence of the highest degree of imputative responsibility.¹¹⁵ Knowledge rivals intent as an archetype of the guilty mind.¹¹⁶ Aside from theoretically-reasoned

109. See *id.* (criminalizing behavior in which the superior “failed to take all necessary and reasonable measures within his or her power to prevent or repress” the commission of the crimes).

110. See MOORE, *supra* note 94, at 88-89 (explaining that the only goal of the retributive theory is to punish the offender because he did the offense and that punishing someone for any other reason does not achieve retributive justice).

111. See JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.01 (3d ed. 2001) (quoting *Dennis v. United States*, 341 U.S. 494, 500 (1951)) (noting that the existence of *mens rea* is “rule of, rather than the exception to, the principles of Anglo-American criminal jurisprudence”).

112. See *generally id.* §§ 10.03-10.04 (defining various forms of *mens rea* and analyzing their appropriateness from utilitarian and retributive perspectives).

113. See SISTARE, *supra* note 90, at 93 (discussing the role of intentionality in establishing *mens rea*).

114. See *id.* (examining the implications of intention).

115. See *id.* (defining intent as, among other things, “to design, resolve, propose, or plan for”).

116. See *id.* at 119 (differentiating between intent and knowledge).

justifications, it seems intuitively correct to hold criminally liable a person who acts with knowledge of the consequences of his conduct.¹¹⁷ Recklessness is also a well-accepted theory of criminal culpability. An actor is reckless if he consciously disregards a substantial risk.¹¹⁸ Disregarding a risk is, in essence, a conscious departure from an acceptable level of “legally permissible risk-taking.”¹¹⁹

Negligence is a highly-debated, but well-established basis for imposing criminal liability.¹²⁰ It is a concept infused with overtones of a utilitarian-based deterrence philosophy of criminal law.¹²¹ A law that contains a negligence standard ascribes liability if a reasonable person should have known that his conduct would have certain consequences.¹²² Assigning liability for negligence may increase deterrence by forcing people to act with greater consideration for the consequences of their actions.¹²³

117. *See id.* (asserting that knowledge has long been recognized as an element of responsibility).

118. *See id.* at 93 (defining “recklessness” as a situation where the actor was most likely aware of particular circumstances or of the probability that specific consequences would result).

119. GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 262 (1978) (noting the difference between disregarding a risk and failing to perceive a risk, the latter resulting from a failure to adhere to reasonable standards of attentiveness).

120. *See* DRESSLER, *supra* note 111, § 10.04(D)(2)(c) (explaining the controversy over holding someone accountable for negligence when they do not actually have a *mens rea*, or “guilty mind”). Utilitarians debate punishing negligent actors because such punishment will not serve the purpose of deterrence if the actor was unaware to begin with. *Id.* Retributivists also debate whether punishment for negligence is appropriate or whether an actor must have done “voluntary wrongdoing.” *Id.*

121. *See* HUSAK, *supra* note 87, at 132 (identifying deterrence as a source of debate among theorists when considering the effectiveness of attaching criminal liability to negligence and questioning the wisdom of accepting negligence as a form of *mens rea*).

122. *See* DRESSLER, *supra* note 111, § 10.04(D)(2)(a) (defining negligence as “the standard of care that a reasonable person would have observed in the actor’s situation”).

123. *But see id.* § 10.04(D)(2)(d) (noting that theorists disagree over whether criminal liability inspires would-be offenders to consider their actions more carefully but suggesting that the argument is actually irrelevant as it pertains to the fairness of ascribing criminal liability to negligent actors because the primary question is whether or not negligent persons “deserve” to be held criminally

The debate over negligence as a just basis for imposing criminal liability is best examined in two analytical stages. The first stage assesses whether persons who act negligently ever deserve criminal liability.¹²⁴ The second stage accepts that negligence can be a valid basis for criminal liability, but evaluates the conditions under which individuals may properly be held liable for the acts of another based on this objective, rather than on an individualized, standard.¹²⁵

An affirmative choice to do wrong essentially defines culpability.¹²⁶ Accordingly, negligence may be considered, *prima facie*, an improper basis for liability because it does not create a sufficient link between the criminal liability imposed and an individualized awareness of responsibility. Culpability arises from a failure to perceive a risk rather than a deliberate choice to disregard a risk or commit a wrongful act.¹²⁷

Although not reflecting a guilty mind that is rooted in some conscious choice, it nevertheless makes some sense to morally condemn a failure to carefully consider a particular situation and to disregard cognizable risks.¹²⁸ However, this kind of culpability is distinguishable from other forms of culpable choice, and should be

liable).

124. Cf. MODEL PENAL CODE AND COMMENTARIES § 210.4 (Official Draft and Revised Comments 1980) [hereinafter MODEL PENAL CODE] (representing a deontological retributive approach).

125. See Timothy Wu & Yong-Sung (Jonathan) Kang, *Criminal Liability for the Actions of Subordinates – The Doctrine of Command Responsibility and Its Analogues in United States Law*, 38 HARV. INT'L L. J. 272, 278 (1997) (declaring that two problems must be addressed when holding subordinates accountable, including whether a superior shares the same *mens rea* of his subordinate and when it is fair to hold a superior liable for a subordinate's actions).

126. See MOORE, *supra* note 94, at 412 (distinguishing between a person who acts unreasonably but is unaware of the associated risk and a person who undertakes an unreasonable risk understanding the implications of the action).

127. See SISTARE, *supra* note 90, at 138 (noting that one objection to a negligence *mens rea* is that it holds people accountable when they did not choose to commit crimes).

128. See *id.* at 139 (stating that the failure to consider circumstances and to take sensible precautions are kinds of choices concerning “the reasonable exercise of capacities in conduct” and are “ordinary grounds for moral censure,” but are not choices of intended action).

viewed as a lesser form of culpability, even if not completely inconsistent with a morally-rooted theory of law.¹²⁹

Despite theoretical arguments that question the validity of negligence as a state of mind sufficient for imposing criminal liability, it does exist and is actually quite common.¹³⁰ Even accepting that negligence can be a legitimate basis for imposing liability, the circumstances and conditions under which negligence liability generally operates is necessarily bounded by the “low level of responsibility involved.”¹³¹ For example, many negligence-based criminal laws only permit a finding of liability for negligence that is considered a gross deviation from the standard of conduct.¹³²

In addition, punishment for crimes with a negligence *mens rea* is also generally more lenient, possibly reflecting an inherent uneasiness with apportioning punishment equal to those crimes with a higher *mens rea* and a stronger indication of individualized guilt.¹³³ Finally, most criminal laws require some affirmative conduct that strongly reflects a deliberate choice to act negligently.¹³⁴

2. *Actus Reus: Omissions under Criminal Law Theory*

Despite the focus on a guilty mind, criminal law does not impose liability for thoughts alone.¹³⁵ Rather, there must be some

129. See MOORE, *supra* note 94, at 414 (arguing that culpability based on negligence represents liability arising from lack of judgment as opposed to choice).

130. See MODEL PENAL CODE, *supra* note 124, at 83 (noting the trend to require “something more” than ordinary negligence to establish criminal liability).

131. See SISTARE, *supra* note 90, at 141 (asserting that gross negligence is a preferable standard for criminal liability).

132. See MODEL PENAL CODE, *supra* note 124, § 210.4 (explaining the reasoning underlying the Code’s insistence on gross negligence instead of inadvertent negligence for criminal liability).

133. See, e.g., United States Sentencing Guidelines, § 2A1.4 (increasing the base offense level, and thus the sentence length, for criminally negligent homicide from level 10 to level 12, and increasing the base offense level for reckless involuntary manslaughter offenses from level 14 to level 18).

134. See SISTARE, *supra* note 90, at 45 (introducing the concept of the act doctrine as a basic principle of liability).

135. See HUSAK, *supra* note 87, at 93 (noting that no Anglo-American jurisdiction has likely ever punished someone for thoughts that did not result in action).

manifestation of that guilty mental state in the form of conduct.¹³⁶ This conduct is an elemental requirement of criminal law known as the *actus reus*.¹³⁷

While the *actus reus* element can be understood as a requirement of affirmative, physical action, it can also be viewed less formalistically, in a manner that examines the purpose of the element.¹³⁸ From this perspective, omissions can meet the defeasible principle even if they are not the paradigm of *actus reus*.¹³⁹

Although generally accepted as a legitimate form of *actus reus*, criminal liability for an omission is less common than criminal liability for affirmative conduct.¹⁴⁰ There are a number of reasonable explanations for this.¹⁴¹ Omissions are often harder to identify than commissions, which may make legislators reluctant to create crimes that are difficult to prove.¹⁴² Additionally, there may be a general reluctance to ascribe a duty to act due to the tradition of liberalism in

136. See DRESSLER, *supra* note 111, § 9.02(A) (explaining that a voluntary act is generally considered an implicit element of a crime).

137. See *id.* § 9.01(A) (defining *actus reus* as a voluntary act that causes social harm).

138. See *id.* (defining and explaining the act doctrine as “a defeasible (negative) principle,” the function of which is to “preclude from criminal liability and legislation...status offenses, liability based on condition or propensity, and ‘punishment for mere thoughts’”).

139. See *id.* at 56 (noting that omissions should be distinguished from simple non-events). An omission that can form the basis for liability must be the correlative of an act that a person was under a duty to perform. *Id.* For criminal omissions, the framework of expectations derives from created or legally recognized obligations. It is the framework of expectations, in part, which enables us to identify omissions as distinguished from non-events. The expectations help us to specify the circumstances constituting a failure of performance. *Id.* See generally HUSAK, *supra* note 87, at 83–97 (identifying omissions as the most difficult upon which to impose liability).

140. See SISTARE, *supra* note 90, at 57 (explaining that Anglo-American law does not generally recognize a legal duty to act).

141. See *infra* notes 142–143 and accompanying text (examining two reasons why omissions are less often relied upon as a basis of culpability).

142. But see SISTARE, *supra* note 90, at 58 (contending that the difficulty in identifying omissions versus commissions should not determine whether or not they may form the basis for criminal liability).

criminal law which places a societal emphasis on personal freedom and minimizes the imposition of obligations on individuals.¹⁴³

From a philosophical perspective, omissions—as a form of culpable conduct—do not implicitly offend either a utilitarian-based deterrence theory or a deontological retributive theory. Imposing liability for a failure to act can create the same incentives and deterrent effect as for affirmative action.¹⁴⁴ Moreover, the moral approbation that is associated with affirmative action would seem to attach as readily, although perhaps not to the same extent,¹⁴⁵ to a failure to act, provided there was a guilty mind.¹⁴⁶

Although there may be no self-evident, cogent rationale for preferring commissions to omissions as a condition of criminal liability, a general discomfort with omissions seems intuitively correct.¹⁴⁷ In some sense, this intuitive appeal seems linked to society's culpability judgments regarding what kind of conduct should be considered wrongful.¹⁴⁸ Intuition regarding the level of culpability, however, does not necessarily imply that omissions are not a valid form of culpable conduct, only that we prefer commissions.¹⁴⁹

143. See MOORE, *supra* note 94, at 278 (theorizing that a criminally enforceable duty impedes on individual liberty more than a law that prohibits specific acts).

144. See DRESSLER, *supra* note 111, § 9.06(B) (noting that, for example, punishing people for their omissions might breed social cohesion and deter those who would otherwise do wrong from acting for fear of likely intervention).

145. See MOORE, *supra* note 94, at 278-79 (arguing that some failures to act are wrongful, but they are less deserving of punishment than an affirmative wrongful act).

146. *But see* DRESSLER, *supra* note 111, § 9.06(C) (claiming that it may be more difficult to infer *mens rea* from an omission because non-acts may be "ambiguous").

147. See e.g., George P. Fletcher, *On the Moral Irrelevance of Bodily Movements*, 142 U. PA. L. REV. 1443, 1448-49 (1994) (expressing concern that punishment for omissions violates the principle that one should not be punished for something that is not prohibited by law). Fletcher is particularly troubled by the cases where one allows another to die by not helping them, and then the act is therefore labeled as murder. *Id.*

148. See *id.* at 1149 (determining that the literature discussing omissions is mainly focused on "condemning the injustice of not punishing immoral omissions").

149. See SISTARE, *supra* note 90, at 60 (maintaining that criminal liability does not turn on the degree of wrongfulness but rather on the level of the actor's

If not *per se* an improper basis for liability, it seems reasonable and fair to create a duty and assign a positive obligation under the criminal law doctrine of command responsibility. Military and civilian leaders who accept the responsibilities and authority of their positions must also be aware of and accept the attendant obligations.¹⁵⁰ Assessing the justness of the command responsibility doctrine ultimately requires consideration of the omission element in conjunction with the mental element.¹⁵¹

3. *The Confluence of Omission and Negligence in Command Responsibility: A Problematic Theory of Criminal Liability*

Although omissions or negligence are not independently objectionable, the combination in a criminal doctrine is troublesome.¹⁵² This Article contends that individuals have a more tenuous link to their omissions, generally having far less control and exercising less independent choice, than to their commissions.¹⁵³ In the command responsibility context, the violator may combine the *actus reus* of omission with a minimum *mens rea* of negligence, which also lacks a strong volitional element.¹⁵⁴ This combination is problematic because it assigns liability to a superior without a strong element of fault and without a strong element of independent choice manifested through some action.¹⁵⁵

culpability).

150. See Wu & Kang, *supra* note 125, at 290 (arguing that the burden of accountability must fall on those individuals who wield the power to prevent crimes from being committed).

151. See *id.* at 291 (noting that it would be unfair to punish superiors for acts over which they did not have control).

152. See *infra* notes 153-159 and accompanying text (concluding that basing liability on a combination of negligence and an omission means punishing someone who has no individualized fault).

153. See SISTARE, *supra* note 90, at 58-59 (relating society's general aversions to criminalizing omissions based upon a difficulty in conceptualizing fault in "failing to avert a result").

154. See Wu & Kang, *supra* note 125, at 278 (reviewing the command responsibility doctrine's basic principles of a superior's omission in controlling a subordinate and a minimum of negligence in the superior's knowledge that the subordinate was about to commit an illegal act).

155. See *id.* at 283 (observing that a lowered *mens rea* requirement makes the "scope of criminal law less predictable" and results in a "chilling effect" on

Negligence bases liability not on the subjective state of mind of the violator, but on an objective standard that the violator fails to meet.¹⁵⁶ Negligence assigns liability in rare circumstances in which the absence of individualized responsibility seems acceptable and under circumstances and conditions that justify its imposition.¹⁵⁷ One such circumstance should be an overt, volitional act that is not met by an *actus reus* of omission.¹⁵⁸ Without such an act, the command responsibility doctrine requires almost no evidence of individualized responsibility and, therefore, is incompatible with a theory of criminal justice that values the individual as the necessary unit of moral accountability.¹⁵⁹

4. *The Confluence of Omission and Recklessness (Willful Ignorance): A More Justifiable Theory of Liability*

Although omissions can be a valid form of conduct, the minimum required *mens rea* should be higher than negligence.¹⁶⁰ The issue thus becomes the appropriate mental state on which liability based on an omission may be justified.¹⁶¹ This Article asserts that there must be some individualization of fault before criminal liability is ever

blameless and desirable conduct”).

156. See *id.* at 284-85 (interpreting the objective standard of negligence in the command responsibility doctrine as a superior being held responsible for “the knowledge that a reasonable agent in his position would have possessed,” regardless of the “conscious apprehension(s)” of the superior).

157. See Damaska, *supra* note 7, at 455 (explaining that lawmakers created the command responsibility doctrine’s liability under the recognition that superiors develop plans and issue orders for their subordinates to execute resulting in a crime and affording superiors more “opportunity for deliberation and reflection than their subordinates”).

158. See *id.* (drawing a distinction between the omission to prevent and the omission to punish and distinguishing the culpability involved).

159. But see FLETCHER, *supra* note 119, at 626-27 (examining negligent omissions and stating that “there is nothing linguistically amiss in ‘intentionally’ or ‘negligently’ breaching a duty where the duty consists of acting a particular way, rather than in averting an impending harm”).

160. See Wu & Kang, *supra* note 125, at 283 (noting practical deterrence-based reasons for requiring an elevated *mens rea* requirement).

161. See SISTARE, *supra* note 90, at 60 (arguing that the law cannot determine the comparative weight of moral duties to act, but instead it can only measure the *mens rea* behind the act or omission).

appropriate, and that this individualization must exist in the confluence of conduct and mental state.

Recklessness or willful ignorance may satisfy this requirement of a mental state that has some individualized awareness of fault.¹⁶² A person acts recklessly “when he consciously disregards a substantial and unjustifiable risk” under a specific set of circumstances.¹⁶³ Unlike mere negligence, recklessness requires a subjective analysis of a person’s mental state under this specific set of circumstances.¹⁶⁴ Moreover, recklessness involves a culpable, affirmative choice to disregard a substantial risk.¹⁶⁵ Negligence only requires a failure to perceive a risk.¹⁶⁶ Willful ignorance is a species of recklessness or knowledge where an individual intentionally or consciously avoids knowing something incriminatory.¹⁶⁷ While the point is arguable in the command responsibility context, recklessness and willful ignorance are more justifiable under a deontological retributive theory because these mental states contain some element of conscious wrongdoing under particularized circumstances.¹⁶⁸

162. See *infra* notes 163-168 and accompanying text (comparing the definitions of “recklessness,” “willful ignorance,” and “negligence” and contrasting the *mens rea* analysis required for each).

163. See MODEL PENAL CODE § 2.02 (defining “recklessly” and elaborating that disregarding a risk “involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation”).

164. Compare BLACK’S LAW DICTIONARY 1142-43 (5th ed. 1979) (referring to the *mens rea* analysis for recklessness as “[t]he state of mind accompanying an act, which either pays no regard to its probably or possibly injurious consequences”), with *id.* at 930-31 (giving the required *mens rea* analysis for “negligence” as “[t]he omission to do something which a reasonable man, guided by those ordinary considerations which ordinarily regulate human affairs, would do”).

165. See *id.* at 1142-43 (elaborating that “recklessness” involves a “state of mind “which, though foreseeing such consequences persists in spite of such knowledge”).

166. See *id.* at 930-31 (relaying that “negligence” involves “a failure to do what a person of ordinary prudence would have done under similar circumstances”).

167. See *id.* at 1434 (describing “willful” as denoting “an act which is intentional, or knowing, or voluntary, as distinguished from accidental”).

168. See MOORE, *supra* note 94, at 79 (claiming that active responsibility encompasses the properties of wrongdoing and culpability, which in turn consist of voluntariness, causation, intentionality, and lack of excuse).

In sum, a respect for human dignity under the law requires a certain level of individualized fault before criminalization and punishment are appropriate.¹⁶⁹ In those instances in which superiors are held liable for negligently failing to prevent or punish crimes of subordinates, the doctrine of command responsibility offends this basic tenet. Alternatively, in those instances where the doctrine requires a *mens rea* that is more than negligence, it is more justifiable.¹⁷⁰

III. AN EXPLANATORY ACCOUNT

The most recent declaration of the command responsibility doctrine in the ICC statute indicates that a negligence standard will likely persist under international law.¹⁷¹ Such a standard, in combination with an *actus reus* of omission, is offensive to a deontological retributive theory of criminal law that values individual responsibility.¹⁷² At least three explanations exist for this condition.

First, the recognition of a negligence standard may be attributable to the fact that in the international context, the retributive theory is not the dominant normative philosophy of law. In addition, major international instruments, while listing multiple objectives for

169. See *id.* (arguing that punishing those who deserve punishment is what “gives the essence, and defines the borders, of criminal law”).

170. See *supra* notes 163-168 and accompanying text (proposing recklessness and willful ignorance as proper substitutes for negligence in the command responsibility context); S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg. at 13, U.N. Doc. S/RES/955 (1994) (citing the Statute of the International Criminal Tribunal for Rwanda which mandates that in imposing penalties, the ICTR must take into account the “individual circumstances of the convicted person”). Although international tribunals must account for individual circumstances in their sentencing guidelines, there is no requirement that they limit the penalty based on the state of mind. See also *Prosecutor v. Musema*, Case No. IT-96-13 ¶¶ 987-88 (stating the general principles of the ICTR regarding the determination of sentences). For example, in *Musema*, the Tribunal balanced mitigating and aggravating circumstances, but felt that “deterrence, to dissuade for ever others who may be tempted to commit atrocities” was the preeminent concern. *Id.* ¶ 986.

171. See Rome Statute, *supra* note 78, art. 28 (citing the sections of the Rome Statute that indicate that a commander or a superior will be liable in situations where they “should have known” that their subordinates were committing crimes).

172. See MOORE, *supra* note 94, at 28 (arguing that the retributive theory of criminal law requires punishment only when the offender is directly and consciously at fault).

international law, generally fail to adopt a normative theory to guide the creation of laws when different objectives come into conflict. For example, in establishing the ICTY, Security Council Resolution 827 states that the purpose of the Tribunal is to “put an end to [international crimes] and to take effective measures to bring to justice the persons who are responsible for them.”¹⁷³ This statement indicates that the United Nations is focused on the objectives of deterrence and just punishment; however, it does not state that one objective is absolute.¹⁷⁴ Similarly, the ICC’s website describes individual criminal accountability as “a cornerstone of international criminal law,” and effective deterrence “a primary objective of those working to establish a criminal court,” without any indication of which objective is paramount.¹⁷⁵

If retribution is not the dominant theory, it must share developmental influence with other theories, and, therefore, cannot independently shape the creation of international legal principles.¹⁷⁶ Without a dominant theory, the creation of international law involves a dynamic of compromise that advances the values and needs of the international community in a pragmatic way.¹⁷⁷ The creation of both customary and treaty law processes balance and trade normative theories, political principles, and practical objectives in a manner that maximizes the collective good under prevailing circumstances. This

173. See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993) (outlining the U.N.’s basis for establishing the ICTY), *available at* http://www.un.org/icty/basic/statut/S-RES-827_93.htm (last visited Oct. 19, 2004).

174. See *generally id.* (failing to declare which objective of the ICTY, deterrence or punishment, takes precedence in prosecuting war crimes).

175. See Rome Statute, *supra* note 78, overview (providing the United Nations’ reasons for why the world needs an International Criminal Court).

176. See, e.g., LYAL S. SUNGA, THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW, DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION 325 (1997) (rejecting a retribution theory and stating that “international criminal law must serve broader purposes for the community at large, on a constructive and prospective basis, whether built on the foundations of utilitarianism, or a ‘social engineering approach’”).

177. See Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT’L L. 510, 543 (2003) (explaining prosecutorial discretion and noting that the tribunals combine a retributive and deterrent methodology).

dynamic was evident in the ICC negotiations on the Elements of Crimes.¹⁷⁸ As one commentator noted:

[S]ome delegates approached the Elements from the perspective of ensuring broad principles that would facilitate prosecution. Other delegates tended to approach the Elements from the perspective of the accused or safeguarding sovereignty. Both approaches were ultimately useful, as the resulting debate and dialogue were necessary in order to strike the right balance in the Elements.¹⁷⁹

While such a balancing approach may be necessary, it can result in legal doctrines that compromise principles for practical results. This compromise may be permissible under a utilitarian approach that seeks to maximize the net social good.¹⁸⁰ However, it is not satisfactory under a principled theory, such as retributivism, which holds that the situation only warrants punishment if offenders deserve to be punished.¹⁸¹

A second explanation for the failure to observe the principle of individual fault is that the international community, while generally focused on moral principles and retributive theory, recognizes the justness of collective responsibility in some circumstances.¹⁸²

178. See ICC: ELEMENTS AND RULES, *supra* note 77, at 219 (referring to the events surrounding the negotiations of the Rome Statute in which the majority acceded to the minority on the issue of developing Elements of Crimes as “part of an overall effort to reach general agreement and to make every effort to accommodate any legitimate concerns of hesitant delegations” in order to finalize the Rome Statute).

179. *Id.* at 221 (asserting that the disagreements between the parties to the Rome Statute created a negotiated instrument of international law that was satisfactory to both sides, thus “bolster[ing] the credibility of the Court as a truly international court”).

180. See HUSAK, *supra* note 87, at 132 (indicating that some theorists believe a negligence standard creates a greater good by deterring crimes that negatively affect society as a whole, in exchange for punishing one individual who may not have a high degree of personal fault).

181. See MOORE, *supra* note 94, at 28 (maintaining that the retributive theory and its requirement of individual culpability cannot co-exist with deterrence as an effective goal of international law).

182. See *infra* notes 184-188 and accompanying text (contending that normally, individualistic societies are capable of accepting collective responsibility for crimes in certain conditions, but that such an acceptance is usually found only in situations where those that are also held liable had a reasonable degree of control

Generally, collective responsibility considers the group as the moral unit, not the individual.¹⁸³ Although concerned with blameworthiness, this theory does not regard individual moral responsibility as an absolute requirement of punishment.¹⁸⁴ Rather, individual moral responsibility is merely the predominant characteristic of modern individualistic societies.¹⁸⁵ A society that recognizes a less individualistic ethic, with a focus on the clan or family, may find certain applications of collective responsibility palatable and uncontroversial.¹⁸⁶ More importantly, if society does not regard the individual as the absolute unit of moral accountability, then it may be acceptable, under certain conditions, for the international community to assign responsibility based on group membership.¹⁸⁷ If the international community recognizes the justness of collective moral responsibility, then a respect for the individual as an individual is not as necessary.¹⁸⁸

over the other's actions and where there is a known limitation to where the group liability ends).

183. See JOEL FEINBERG, *DOING & DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 233 (1970) (describing collective liability as "the vicarious liability of an organized group" including "a loosely organized, impermanent collection or a corporate institution").

184. *Cf.* LARRY MAY, *THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM, AND CORPORATE RIGHTS* 76 (1987) (taking a "middle position" in which collective moral responsibility to groups of persons is not sufficient for the ascription of individual moral responsibility).

185. See FEINBERG, *supra* note 183, at 240 (comparing present day individualistic societies, in which the public expects individual privacy, with more collective societies of the past, where group membership was necessary for survival at the expense of privacy).

186. See Waley-Cohen, *supra* note 92, at 127 (discussing Chinese law and noting that the influence of traditional notions of criminal collective responsibility are still present in modern law due to the deeply ingrained concepts of family and community responsibility).

187. See FEINBERG, *supra* note 183, at 240-41 (suggesting that imposing collective criminal liability on groups as a mandatory self-policing device is not reasonable because it is no longer an acceptable form of social organization).

188. See J.R. LUCAS, *RESPONSIBILITY* 77 (1993) (explaining that, despite its appeal, this theory is problematic because it is difficult to determine the limits of collective responsibility). While this lack of clear limits does not necessarily invalidate collective responsibility as a theory of liability that, in some sense, respects moral responsibility, the inability to draw principled limitations on the scope of liability should trouble international lawmakers. *Id.*

A third explanation for the development of a command responsibility doctrine that fails to meet fundamental culpability principles is that individual accountability for international crimes is a relatively new genre of international law. While Nuremberg created the precedent for individual accountability,¹⁸⁹ international law has yet to incorporate the type of intensive philosophical discussion regarding justness that should permeate the creation of command responsibility in international criminal law.¹⁹⁰ One commentator has noted that there is “little evidence that the compatibility of imputed command responsibility with the culpability principle has received much attention” in recent deliberations surrounding international criminal jurisdiction.¹⁹¹ Therefore, while most national criminal systems may adhere to the general idea that people should be held responsible according to their own actions,¹⁹² international law neglects to adequately account for this maxim.

CONCLUSION

Irrespective of which explanation is most compelling, the recent development of a permanent international criminal court and the emergence of aggressive universal jurisdiction for certain international crimes requires that the international community now give greater attention to justifying the law.¹⁹³ The imposition of punishment upon individuals requires that international law move beyond a mere

189. See WOETZEL, *supra* note 17, at 6 (recounting the Nuremberg trials of Nazi war criminals for their individual violations of international law during World War II).

190. See Damaska, *supra* note 7, at 456 (alleging that the international lawmaking community has failed to address the inherent inconsistencies of the command responsibility doctrine with existing principles of local criminal laws).

191. See *id.* at 495 (remarking that before international lawmakers solidify permanent institutions of international criminal justice, they must first end their “acoustic isolation from their brethren working the vein of municipal criminal law” in order to adequately address the inconsistencies between command responsibility and doctrines of criminal culpability).

192. See *id.* at 463-64 (citing the ingrained principle of individual culpability in national criminal systems as the reason why command responsibility laws are not enforced outside of international criminal law).

193. See *id.* at 457 (noting that the ability to understand and explain the law will “remove perceptions of undue severity, disarm local opponents of international justice, and increase the legitimacy of international judicial bodies”).

consent-based positivism, and instead move toward a more reflective approach that incorporates some moral compass in law creation. Without a more reflective approach, a discord between principles and law could erode the international criminal justice system's credibility.¹⁹⁴

This more reflective approach does not require a wholesale abandonment of positivism, or a rejection of the dynamic of compromise. International lawmakers have found these influences too deeply-entrenched in current conceptions of international law for them to easily disregard.¹⁹⁵ Rather, international lawmakers should continuously concern themselves with advancing an understanding of a common philosophy of law, even as the reality of international lawmaking recognizes the need for a certain degree of ideological flexibility. At a minimum, this requires that lawmakers begin to identify and accurately describe problematic philosophical issues rather than see these issues "passed over in silence or masked by rhetorical legerdemain."¹⁹⁶ This identification will provide the necessary dialectic framework for rehabilitating international criminal law.

In the short term, this recognition process will only result in legal doctrines such as command responsibility, that are both objectionable and desirable at the same time.¹⁹⁷ However, the objectionable aspects

194. See *id.* at 470-71 (predicting that, as institutions of international criminal tribunals begin to institute judgments based on command responsibility, punishment without individual culpability will offend the public's moral intuitions concerning guilt and create a backlash against the international criminal justice system).

195. See *supra* notes 174-180 and accompanying text (summarizing international lawmakers' dynamic compromise between retribution and other goals of criminal justice that shape the creation of international legal principles in the establishment of the governing objectives of international criminal courts, such as the ICTY and the ICC).

196. See Damaska, *supra* note 7, at 456 (claiming that the only way to address the conflict between national and international criminal law is to recognize their existence and allow international judges to "adequately explain the grounds, perhaps even the necessity, for the departures from [national] legal principles").

197. See *supra* notes 177-181 and accompanying text (conveying that the legitimate goals of deterrence and punishment in international criminal law cannot always coexist without intruding upon some intuitive principles of criminal law, such as individual culpability).

should not diminish or discourage the long-term efforts of international lawmakers towards the creation of a coherent and principled system of international justice. By adopting a measured approach, lawmakers can create a legal system that will eventually meet the dictates of a deontological retributive theory of law.

